Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 75-1440**

EDWARD W. MAHER, Commissioner of Social Services of Connecticut,

*Defendant-Appellant,*

—against—

SUSAN ROE, *et al.*,

*Plaintiff-Appellee.*

**No. 75-442**

JOHN H. POELKER, *etc., et al.*,

*Defendants-Petitioners,*

—against—

JANE DOE, *etc.*,

*Plaintiff-Respondent.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, AND ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE NATIONAL ORGANIZATION FOR WOMEN AND CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS AND INDIVIDUAL PHYSICIANS

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ARGUMENT:

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE NATIONAL ORGANIZATION FOR WOMEN AND CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS AND INDIVIDUAL PHYSICIANS

The undersigned, as counsel for the American Public Health Association, Planned Parenthood Federation of America, Inc., the National Organization for Women and sixty-six medical school deans, professors and individual physicians respectfully move this Court for leave to file the accompanying brief *amici curiae*.

The American Public Health Association is a national non-governmental organization established in 1872. Its object is to protect and promote personal and environmental health. With a membership of over 50,000, it is the largest public health organization in the world. Within this membership, both professional health workers and consumers act in a leadership role to develop a national policy to provide equitable, quality health care for all citizens.

Planned Parenthood Federation of America, Inc., also known as Planned Parenthood-World Population (Planned Parenthood), is a non-profit corporation organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

Planned Parenthood has 188 affiliates in 45 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 725 family planning clinics offering services to the public. Most affiliates offer medical services, including 19 which offer abortion services as part of their program. Twelve affiliates are educational units without medical services. Most Planned Parenthood affiliates which do not perform abortions themselves offer abortion counseling and referral.



Planned Parenthood's concern with family planning and health necessarily includes concern with the availability of abortion, and with the compelling problems resulting from restrictive abortion laws which have in the past made medically safe, legal abortions unavailable to many women. On October 19, 1974, the membership of Planned Parenthood adopted the following Policy Statement:

> Planned Parenthood believes that the optimum method of birth planning is the consistent employment of effective contraception. However, in the event of unwanted pregnancy, abortion as a back up procedure must be available and accessible to all women.
>
> The Constitutional right of privacy includes a woman's right to seek an abortion. Planned Parenthood believes that a woman, in consultation with a physician, has the right to obtain an abortion under safe, legal, dignified conditions, and at a reasonable cost. A woman should be fully informed and counselled concerning the nature, the consequences, and the risks of the procedure. Under every circumstance, a woman should have full knowledge of the alternatives available to her when making a decision to continue or terminate a pregnancy.
>
> Abortion must always be a matter of personal choice. Planned Parenthood recognizes its responsibility to guard equally against coercion or denial in connection with a patient's decision about continuing a pregnancy. The Federation will exercise special vigilance in protecting the freedom of choice and the civil rights of those who are dependent upon either public or voluntary agencies and in protecting a woman's personal choice.

> No one should be denied abortion services because of age, inability to pay, or other economic or social circumstances. Public and private funds should be made available to subsidize the cost of abortion services for those who want, and need, but cannot afford them.

The National Organization for Women (NOW) is a non-profit civil rights organization of over 30,000 members and 700 chapters throughout the United States. Organized in 1966, NOW exists to secure full and equal social, political, and economic rights for women.

All of these organizations believe the outcome of these cases deeply affects the rights of poor women to control their own bodies and destinies. Convinced these rights are essential to personal moral integrity and the achievement of full economic and social equality, these organizations seek to present the reasons they believe the judgment below must be affirmed.

The more than 65 individual physicians who as *amici* subscribe to this brief all practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are training in the speciality of obstetrics and gynecology. These physician believe that the policies challenged in these cases constitute an unwarranted governmental interference with the right of physicians to administer health care in accordance with their best professional judgment.

The annexed brief argues that Connecticut, by denying Medicaid payments for abortions, has placed a heavy burden on the woman's constitutional right to choose whether or not to have an abortion while advancing no legitimate state interest. Similarly, St. Louis, by denying access to



public hospitals to poor women who choose abortion, establishes an invidious distinction between those pregnant women who choose delivery and those who choose abortion, and advances no legitimate purpose. These classifications violate the constitutional guarantee of equal protection.

We have sought the consent of the parties to file a brief *amici curiae*. Counsel for Appellee, Appellant and Respondents have consented. Counsel for Petitioners have not replied to our request.

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## BRIEF *AMICI CURIAE* OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE NATIONAL ORGANIZATION FOR WOMEN AND CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS AND INDIVIDUAL PHYSICIANS

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

## Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

## Summary of Argument

When Connecticut denies Medicaid payments for services provided to those indigent pregnant women who choose to have an abortion, while paying for services provided to those women who choose to carry their pregnancy to term, the state creates an invidious classification which effectively denies poor pregnant women their Constitutional right to privacy. Medicaid benefits for treatment of pregnancy are conditioned upon the forfeiture of the woman's right to choose, with her physician, whether or not to have an abortion. Similarly when St. Louis closes the doors of its public hospitals to women seeking medical services for abortion, while providing public hospital services to those women who choose to carry pregnancy to term, the City creates an invidious classification which discriminates against those women who would choose to have an abortion.

No compelling state interest justifies these infringements on the rights of poor women. Indeed, policies restricting access to abortion sacrifice every legitimate state interest in this area. These policies substantially increase risks to maternal health and directly increase demands on public



funds. The only interest actually furthered by these policies is an impermissible one of forcing poor women to act in accordance with the religious views of a segment of the population.

## ARGUMENT

### I.

**The judgments below must be affirmed because state policies denying Medicaid payments and public hospital services to pregnant women who choose abortion, while providing such payments and services to women who choose to carry pregnancy to term, deprive women and their physicians of the constitutionally protected right of privacy, create an invidious classification invalid under the Fourteenth Amendment, and serve no legitimate state purpose.**

#### A. *State Action Creating a Distinction Between Those Poor Pregnant Women Who Choose Abortion and Those Who Choose Childbirth Must—at a Minimum, Be Supported by Some Legitimate State Interest.*

The issue presented in these cases is whether the state, having chosen to provide poor women with public services for the treatment of pregnancy, may create a distinction between those women who choose to have an abortion and those who choose to carry pregnancy to term. General equal protection principles require that whenever the state creates a classification denying or limiting benefits to one group of people while granting benefits to another group alleged to be similarly situated, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly

circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). If the denial or limitation of benefits discourages the exercise of a constitutionally protected liberty, the classification must be supported by a compelling state interest.[1] The "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Roe* v. *Wade,* 410 U.S. 113, 153 (1973). *See also Planned Parenthood of Central Missouri* v. *Danforth,* 96 S. Ct. 2831, 2837 (1976). In light of the constitutional protection afforded the right to choose whether or not to have an abortion, and in light of the direct and substantial impact which the policies challenged here have in denying that right of choice to poor women, the more stringent constitutional standard is clearly more appropriate. However, the policies challenged here cannot pass muster under any constitutional standard since they do not further any legitimate state purpose.

It is important to note at the outset the factors which make this case fundamentally different from similar constitutional claims presented to this Court, and to delineate the issues which are not presented. This case is unique for two reasons. First, it is unique because pregnancy is unique. Although pregnancy is a condition which, in this

[1] *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969) held that welfare recipients who moved from one state to another were exercising a constitutional right to travel and "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Stated another way, "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert* v. *Verner,* 374 U.S. 398, 405 (1963). *See also Memorial Hospital* v. *Maricopa,* 415 U.S. 250, 261-62 (1974).



society, requires medical treatment, it is not a disease, illness or injury. Pregnancy is, in most cases, a normal condition which requires medical treatment. It is the only common normal condition for which medical treatment is rountinely needed. For this reason, analogies drawn about other sorts of medical treatment are of limited utility. The concept of medical necessity in relationship to the treatment of pregnancy is discussed in more detail in section I-B-ii, *infra.*

The issues presented here are unique for a second reason, which has direct bearing on the constitutional standard to be used in judging the validity of the classification created by the State of Connecticut and the City of St. Louis. Over the past decade this Court has had many occasions to consider whether constitutional guarantees of equal protection are infringed when the state, in the interest of preserving limited public funds, denies or limits benefits to one class of poor people, while granting benefits to another class alleged to be similarly situated.[2] But never before has there been a case in which poor people have asked that they be afforded a less costly benefit, and the state has insisted that they may only have a more costly one.

There are two issue which these cases do not present. First, these are not cases in which the plaintiffs argue that the right to abortion is so fundamental that the state has an affirmative obligation to enable the poor to obtain services which people with money may purchase for themselves. This Court has held that some rights are so funda-

[2] *See, e.g., Shapiro* v. *Thompson, supra; Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Memorial Hospital* v. *Maricopa, supra.*

mental that the state must provide the poor with the means to exercise them.[3] Arguably the right of privacy in relationship to abortion is a right of such fundamental importance.[4] Some lower courts have so held.[5] But this

[3] *Boddie* v. *Connecticut*, 401 U.S. 371 (1970). *See also Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

[4] *Boddie* v. *Connecticut*, *supra*, at 374, rests in part on the fundamental importance of "the marriage relationship in this society's hierarchy of values." Whether a woman has a child or not has an impact on the individual life of magnitude which is, if anything, greater than whether an individual remains married. For example, in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), this Court recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The other critical factor in *Boddie* was that the state monopolized the means by which individuals could begin or end a marriage. While the state does not directly monopolize the provision of abortion services, it does require that these services be provided by licensed medical personnel, and state determinations about the availability of Medicaid and public hospital services effectively determine whether or not poor women will be able to obtain abortion services.

[5] *Klein* v. *Nassau County Med. Ctr.*, 347 F. Supp. 496 (E.D.N.Y. 1972), *vac.* and *rem.* in light of *Doe* v. *Bolton* and *Roe* v. *Wade*, 412 U.S. 925 (1973). Remand decision 409 F. Supp. 731 (E.D.N.Y. 1976), appeal docketed May, 1976.

The three judge district court in *Klein* held: "The directive [which denies Medicaid reimbursement for abortions that are not 'medically indicated'] and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term childbirth, have complete freedom to make the choice . . . uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child . . . She is thus discriminated against by reason of her poverty and by reason of her behavioral choice." *Id.* at 500. *See also Doe* v. *Rose*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Westby*, 383 F. Supp. 1143 (D. S. Dak. 1974), *vac.* and *rem.* 420 U.S. 968 (1975); remand decision 402 F. Supp. 140 (D. S. Dak. 1975); *Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975).



more difficult issue is not presented by these cases. Rather the issue here is whether the state, having chosen to provide medical services for pregnancy, may deny those services to those women who choose abortion rather than delivery.

There is a second difficult question which is not presented by these cases. That is the issue whether the state is constitutionally free to exclude all services for treatment of pregnancy from its medical services programs for the indigent. This Court has held that because of the unique characteristics of pregnancy, the state may exclude benefits for pregnancy from some programs providing benefits to the disabled or ill.[6] But Connecticut has not excluded all services for the treatment of pregnancy from its Medicaid program. St. Louis has not closed the obstetrical and gynocological services of its public hospitals. Public hospitals which offer obstetrical services for delivery have the facilities and trained personnel to provide abortions. Both Connecticut and St. Louis provide services for the treatment of pregnancy, whether normal or complicated. The only limitation is one which conditions the right to services upon the forfeiture of the right of a poor woman to choose, with her physician, to have an abortion. The only issue presented is whether the state may use its public medical programs to coerce poor women, who seek abortion as treatment for pregnancy, to wait until delivery is inevitably required.

[6] *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

**B. *Every Legitimate State Purpose Is Undermined by the Classification Denying Publicly Financed Medical Services to Poor Pregnant Women Who Choose Abortion While Providing Such Services to Women Who Choose Childbirth.***

The State of Connecticut and the City of St. Louis advance diverse and shifting reasons in support of their policies restricting abortion services for poor women. For two years Connecticut defended its policy denying Medicaid payments for "non-therapeutic" abortions exclusively on the grounds that the Social Security Act prohibited such payments. During this time the Secretary of HEW continued to assure the state authorities that federal reimbursement was and is available under Medicaid for all abortions.[7] When the Second Circuit Court of Appeals held that the Social Security Act allows the states to provide payment for abortions without restriction,[8] Connecticut instead of changing its policy asserted new reasons to support it. The reasons now proffered are: 1) "the necessity to limit state funds in the welfare field," and 2) the "service which is being sought to be included for payment . . . is not medically necessary."[9]

St. Louis seems to advance several reasons in support of its policy denying public hospital services to women who seek abortions. First is the protection of the life and health of the mother,[10] and second is the "continuation of the Human Race."[11] For the first time on this appeal, the

[7] *Roe* v. *Norton*, 522 F.2d 928, 931 (2d Cir. 1975).

[8] *Id.* at 932.

[9] *Maher* v. *Roe*, U.S. No. 75-1440, *Brief of Appellant*, p. 23.

[10] *Poelker* v. *Doe*, U.S. No. 75-442, *Brief for the Petitioners*, p. 39.

[11] *Id.* at pp. 39-40, 49-50.



City argues that contrary to the finding of the courts below they do not have a policy prohibiting the performance of non-therapeutic abortions, and advance considerations of administrative convenience as a ground for resisting compliance with the order entered below.[12] None of the reasons asserted in support of the policies denying poor women abortion services can withstand even the most deferential scrutiny.

**i. Since the Policies Restricting Abortions for Poor Women While Providing Pregnancy Services Without Restriction for Women Who Reject Abortion Result in Direct and Substantial Financial Costs to the State, the Interest in Preserving Public Funds Does Not Support the Discrimination Against Poor Women Who Choose Abortions.**

Pregnancy is a condition which, in this society, requires some form of medical treatment. The average cost of abortions performed during the first trimester, as 85% of them are, is $150. Abortions performed in the second trimester cost an average of $350.[13] By contrast, in 1973 Medicaid paid an average of $556 for a normal delivery in a public hospital and $798 in a private voluntary hospital. For the five percent of births delivered by Caesarean section, the average Medicaid payment was $1065 in public hospital.[14] Far from protecting the public fisc, the discriminatory poli-

[12] *Id.* at 41-47.

[13] H.E.W. Memorandum, "Effects of General Provision 431 of the Labor-H.E.W. Act," 120 *Cong. Rec.* 19, 678 (daily ed. Nov. 20, 1974).

[14] Jaffe, "Short-Term Costs and Benefits of United States Family Planning Programs," *Studies in Family Planning*, Vol. 5, No. 3, March 1974.

cies challenged here impose a substantial and direct financial cost to the state.

Connecticut, while maintaining that the major justification for its policy is to save public funds, recognizes that abortions cost less than delivery. But the state argues, "Connecticut is *presently* faced with a fiscal crisis and appears to be more concerned with the short-run aspects of its problem." [15] It is a very short run indeed which concerns the state. In the natural course of events it is nearly inevitable that the woman who, in consultation with her physician, seeks an abortion in one month and is denied, will return no more than nine months hence requiring far more costly delivery services.

An HEW study shows that "for each pregnancy among Medicaid-eligible women that is brought to term, it is estimated that the first-year cost to Federal, State and local governments for maternity and pediatric care and public assistance is approximately $2200." [16] The asserted interest in the preservation of public funds is, in this context, simply not credible. Rather, when the state denies payments to physicians who provide abortion services which both the physician and the woman believe are appropriate, it is shouldering a substantial additional burden on public welfare funds. In effect, the state's policy evidences a willingness to expend significant amounts of public funds for the purpose of denying poor women the right to choose, with their physicians, to have an abortion.

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[15] *Maher* v. *Roe, Brief of the Appellant, supra* n. 9 at p. 23.

[16] Memorandum From Deputy Assistant Secretary for Population Affairs, DHEW, to House-Senate Conference Committee on Labor-HEW Appropriations Bill (H.R. 14232), on Effects of Section 209, June 25, 1976.



*Amici* do not suggest that if the direct financial costs were other than they in fact are, then state discrimination in relation to the abortion choice could be justified. Legitimate concern for the public fisc does not justify conditioning public benefits on the sacrifice of fundamental constitutional liberty.[17] But the fact that the policies denying services to pregnant women who choose abortions produce substantial direct financial costs does emphasize the hollowness of Connecticut's alleged justification. To pass constitutional muster, another reason for the discriminatory classification must be demonstrated.

### ii. Denying Poor Women Public Hospital Services or Medicaid for "Non-Therapeutic" Abortions Does Not Further a General State Interest in Providing Public Services Only for Medically "Necessary" Treatments.

Certainly it is a proper and legitimate state concern to limit the provision of publicly financed medical services to those treatments which are "necessary." In some sense, hospital treatment and physicians' services may not be strictly "necessary" for either childbirth or abortion. For most of human history, both childbirth and abortion were accomplished without either hospitalization or assistance from a physician. As recently as 1940, half of the childbirths in this country took place outside the hospital.[18] Of course, when more abortions and deliveries were performed

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[17] "A state may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . ." *Memorial Hospital* v. *Maricopa*, 415 U.S. 250, 263 (1974). *See also Shapiro* v. *Thompson, supra* at 633.

[18] *Health: United States, 1975*, p. 157 (Rockville, Maryland: U.S. Dept. of HEW, 1976). In 1973, 99% of all births took place in the hospital.

without hospital or physician services many more women died.[19]

It is not at all clear what Connecticut means when it asserts that some abortions are not "medically necessary." The requirement of "medical necessity" does not, in this context, screen out those treatments which can be obtained through self-treatment or from lay personnel. For most women the dangers inherent in undergoing delivery without hospitalization or assistance by a physician are significantly less than the dangers of undergoing a lay abortion. This Court has recognized that states have a legitimate interest in requiring that abortions be performed by qualified medical personnel.[20] While most states prohibit self-induced or lay abortions, states do not prohibit women from delivery at home, without physician assistance.[21] When the state argues that it denies abortion services because they are not "medically necessary," it does suggest that women should obtain the services from a lay practitioner. It is conceded that if abortions are to be done, they should be done by licensed physicians.

Another possible meaning of the term "medical necessity" is a requirement that the patient have a condition for which treatment is appropriate. Sometimes drugs or surgery are provided for conditions which further investi-

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[19] *Ibid.* In 1940 almost 9,000 women died in childbirth. In 1973 fewer than 500 women died.

[20] *Connecticut* v. *Menillo,* 423 U.S. 9 (1975). *See also Spears* v. *Circuit Court of the Ninth Judicial District,* 517 F.2d 360, 364 (5th Cir. 1975).

[21] In 1974 80% of the babies in the world were delivered by midwives. Sablosky, "The Power of Forceps: A Comparative Analysis of the Midwife—Historically and Today," 1 *Women and Health* 10 (1976).



gation would have revealed did not exist.[22] Certainly the state has a legitimate interest in attempting to assure that medical services will be provided with public funds only when the patient actually has the condition which the services are designed to treat.[23] The states can require procedures to assure that abortions are provided only to women who are actually pregnant.[24] But this is not what Connecticut and St. Louis mean when they invoke the term "medical necessity."

In Connecticut, to qualify for Medicaid reimbursement the physician must certify that the abortion is "therapeutic." Connecticut defines a therapeutic abortion as one recommended by both the woman's physician and the Chief of Obstetrics and Gynecology in an accredited hospital as "medically or psychiatrically necessary." Connecticut regulations require a prior authorization form, signed by these two physicians, including a "statement indicating the medical or psychiatric need for the abortion." After the operation, Connecticut requires a form which certifies that, in the opinion of the attending physician, the abortion "is medically necessary for the patient's health." The form must also be signed by the attending physician and attested

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[22] Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce (House of Representatives), *Cost and Quality of Health Care: Unnecessary Surgery* (U.S. Government Printing Office, Jan. 1976).

[23] *See Association of American Physicians and Surgeons* v. *Weinberger,* 395 F. Supp. 125 (N.D Ill. 1975), *aff'd* 96 S. Ct. 388 (1975) upholding the constitutionality of the federal PSRO program designed to assure that services provided to Medicare and Medicaid patients are medically necessary.

[24] *Planned Parenthood* v. *Fitzpatrick,* 401 F. Supp. 554, 574 (E.D. Pa. 1975) upheld the constitutionality of such a requirement.

to by the Chief of Obstetrics and Gynecology.[25] The City of St. Louis prohibits abortions in its public hospitals "for reasons other than to save the mother from grave physiological injury or death." *Doe* v. *Poelker*, 515 F.2d 541, 543 (8th Cir. 1975).

This Honorable Court in *Doe* v. *Bolton*, 410 U.S. 179 (1973), held that a Georgia statute was not impermissibly vague in allowing abortions to be performed only when a physician found that "based on his best clinical judgment that abortion was necessary." Following *United States* v. *Vuitch*, 402 U.S. 62, 71-72 (1971), this Court interpreted the requirement of medical necessity as encompassing "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient." 410 U.S. at 192. Connecticut now states that the "Physician's certification is not questioned by the Department of Social Services and the medical judgment of the physician is not subject to further review of any kind."[26]

With all due deference, while the assurance of this broad and liberal interpretation of the meaning of "medical necessity" is sufficient to protect a physician from the risk of criminal prosecution, the issues presented in the instant cases cannot be resolved by giving a liberal meaning to the term "medical necessity." First, it is apparent that neither Connecticut nor St. Louis intends such a broad and liberal meaning. The entire thrust of the policies in both jurisdictions is to limit abortions for the poor to those which are required because of the risk of severe physio-

[25] Connecticut Welfare Department, *Public Assistance Program Manual*, Vol. 3, Chap. III, Section 275.

[26] *Maher* v. *Roe, Brief of the Appellant, supra* n. 9 at 6.



logical and psychological consequences. Second, and more fundamentally, even if this Court is willing to give constitutional protection to the physician's freedom to determine that an abortion is "necessary" whenever failure to have an abortion would have profound adverse effects on a patient's general well being, many conscientious physicians are not able to characterize all such abortions as "medically necessary." With all due modesty, many physicians are not able to attach the label "medically *necessary*" to all those abortions which many women seek on the basis of a profound personal choice, and which the physician, in his best clinical judgment, deems medically *appropriate*. To most physicians, the concept of "medical necessity" implies a need arising from the likelihood of concrete physiological or acute psychological effects. The concept of "medical necessity" also implies an objective need for the treatment which exists independently of the personal and familial circumstances and choices of the patient.

When an older indigent woman seeks an abortion because she has more children than she can adequately care for, the physician may well recognize that the abortion is absolutely essential to the general well being of the woman and her family. Yet many physicians will not characterize that abortion as one which is "medically necessary" because the need does not arise from physiological or psychological factors which exist independent of the woman's judgment and choice. Or when a young woman seeks an abortion because she believes that she should finish high school, the physician may recognize that this abortion is essential to the patient's general well being, as well as the well being of the children which she may later bear. But again, many

physicians cannot and will not characterize that abortion as one which is "medically necessary."

As Mr. Justice Stevens recently noted, "the most significant consequences of the decision are not medical in character . . . Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life." *Planned Parenthood of Central Missouri* v. *Danforth,* 96 S. Ct. at 2856 (concurring in part, dissenting in part) (1976). While medical consultation is certainly necessary to inform a woman whether or not an abortion is medically appropriate, in most cases, either abortion or delivery will be medically appropriate, and medical care for one or the other will be medically necessary.

Both St. Louis and Connecticut have made plain that if a woman can carry a pregnancy to term without very serious risk to her life or physical health, then abortion is not necessary but "elective." It is important to note that "elective" in the context of abortion means something very different than it does in any other medical context. In other contexts, elective treatments are those for conditions which, if left untreated, may worsen and subsequently require treatment, or may stabilize, or may get better of their own accord. Medical science seldom knows with such precision of the consequences which will follow if an "elective" procedure is not performed. Once a woman is pregnant, it is absolutely certain that some medical treatment is necessary: either an abortion, treatment for a miscarriage, or delivery. Medical treatment itself is not elective but rather is necessary.



The specific policies challenged here are constitutionally prohibited under the principles enunciated by this Court in *Doe* v. *Bolton, supra.* They are prohibited because it is plain that no broad or liberal interpretation of the meaning of "medical necessity" is intended or implemented by the City of St. Louis or the State of Connecticut. The Connecticut policy is further prohibited because it requires the concurrence of a second physician, in direct contravention to the holding in *Doe* v. *Bolton.* Most fundamentally, these policies are constitutionally prohibited because they impinge upon the protected zone of privacy in which a woman and her physician may reach a decision whether, in her particular circumstances, an abortion is the most appropriate form of treatment. When the state imposes a requirement that the physician certify that abortions for the poor are not simply medically appropriate, but are necessary, the effect is to place the power of the state behind one answer to the question whether a particular indigent woman should have an abortion.. The effect is to create two classes of indigent pregnant women, and to penalize those who, with their physicians, determine that abortion is appropriate. In short, the effect is simply to deny indigent women the right of choice which this Court recognized and protected in *Roe* v. *Wade* and *Doe* v. *Bolton.*

### iii. Policies Denying Public Medical Assistance for Abortion Have a Direct and Serious Adverse Impact on the Health of Women.

St. Louis asserts that one purpose of the discriminatory policy challenged here is to protect maternal health. The overwhelming evidence is that policies denying abortion services to the poor expose those women to substantially

increased risks of disability or death. When a woman is denied an abortion, one of three things will happen. Either she will carry the pregnancy to term and deliver, or she will persist and obtain a legal abortion after a period of unnecessary delay, or, in desperation, she will have an illegal abortion. Each alternative exacts large costs in terms of maternal mortality and morbidity.

In terms of immediate risks to the woman, childbirth is more dangerous than abortion. This Court observed in *Roe* v. *Wade,* 410 U.S. at 149, "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." More recent data confirm and underscore this Court's earlier conclusion.[27] For every age group, treatment of pregnancy by delivery creates substantially greater risks of mortality than treatment by early abortion. The disparity of risk is greatest among women between the ages of 40 and 44: they are almost seven times as likely to die in childbirth than they are from an abortion. The disparity of risk is least in women between the ages of 20 and 24. But even in this group the risk of death in childbirth is

[27] Abortions have been legal in New York since 1970. In New York City, from 1970-72, the death rate for first trimester abortions was 1.2 per 100,000. During the same period, the death rate for non-abortion, pregnancy related complications was 26.9 per 100,000 live births. Pakter *et al.*, "Impact of the Liberalized Abortion Law in New York City on Pregnancy Associated Deaths—A Two Year Experience." Paper presented at the Annual Meeting of the American Public Health Association in San Francisco (1973).

In 1973 the death rate for all kinds of abortions, including those in the second trimester, was 4.7 per 100,000 abortions. The death rate for deliveries alone, not including other kinds of pregnancy related deaths, was 10.0 per 100,000 live births. Bureau of Health Statistics and Analysis, New York City Department of Health (1974).



over four times as great as the risk of death from an induced abortion.[28]

When Medicaid and public hospital services are not available to provide abortions, many women will not have abortions. In many parts of the country it is still impossible to obtain an abortion. During 1974 and the first quarter of 1975, only 27% of the short term general hospitals in the United States performed abortions. Only 18% of the public hospitals would perform abortions.[29] If we assume that women in those areas of the country in which abortion services are not available would use those services at the same rate as women in those areas of the country where services are now available, then between thirty and fifty percent of the women who sought abortions in 1975 were not able to obtain them. In 1975 between 260,000 and 770,000 of the women who sought abortions were not able to obtain them.[30] Most of these women who were unable to obtain abortion services they sought are poor, teen-

[28] MORTALITY ASSOCIATED WITH PREGNANCY AND CHILDBIRTH AND INDUCED ABORTION

| Age Group | Pregnancy and Childbirth* | Induced Abortion** |
|---|---|---|
| 15–19 | 10.8 | 2.3 |
| 20–24 | 8.5 | 1.9 |
| 25–29 | 12.1 | 1.9 |
| 30–34 | 25.1 | 4.2 |
| 35–39 | 41.0 | 9.2 |
| 40–44 | 69.1 | 10.1 |

* Ratio per 100,000 births.
** Ratio per 100,000 first-trimester abortions.

Tietze, *et al.*, "Mortality Associated With the Control of Fertility," 8 *Family Planning Perspectives* 6, 7 (1976).

[29] Weinstock *et al.*, "Abortion Need and Services in the United States, 1974-75," 8 *Family Planning Perspectives* 58, 65 (1976). 1.6 percent of public hospitals do not offer services for either abortion or delivery. This case does not raise the question whether public hospitals have a general obligation to provide these services. See *supra* n. 6.

[30] *Id.* at 58.

agers and women living in rural areas.[31] "[B]etween 163,000 and 280,000 Medicaid-eligible women who need and want abortions are unable to obtain them, largely as a consequence of ambiguity in Medicaid policies and administrative practices." [32]

When the state erects bureaucratic and administrative barriers against those women who seek to exercise their constitutionally protected right to choose abortion, some women will travel to other states, and others will attempt to find the funds to allow them to purchase the abortion services from private providers. Delay is inevitable. Risks to maternal health increase quickly and dramatically. Second trimester abortions are far more dangerous than early abortions. The risk of complications is five times greater in a second trimester abortion and the mortality rate is nine times as high as that incident to a first trimester abortion.[33] An increase in second trimester abortions is a direct and inevitable result of denying women abortions in their own communities.

In 1974 over three out of every ten abortions performed in New York were performed on women who came from another state.[34] Connecticut was one of the leading states sending women to New York for abortions.[35] Among New

[31] *Ibid.*

[32] Jaffe, "Memo, Medicaid Financed Abortions," Alan Guttmacher Institute, N.Y. 1976.

[33] *See* Harris *et al.*, "Legal Abortion 1970-1971—The New York Experience," 63 *Am. J. of Pub. Health* 409, 415 (1973); Tietze *et al.*, "Mortality With Legal Abortion in New York City, 1970-72," 225 *JAMA* 507, 509 (1973).

[34] Pakter *et al.*, "Legal Abortion: A Half-Decade of Experience," 7 *Family Planning Perspectives* 248, 249 (1975).

[35] *Id.* at 249.



York City residents, 86% of the abortions were performed in the first trimester when the operation is safest. Only 74% of the non-residents obtained first trimester abortions. Women "who are thwarted by bureaucratic or other delays in their home communities (especially teenagers), account for an increasing proportion of those who travel to New York City for legal abortions." [36]

For many women, particularly indigent women, traveling to another part of the country to obtain abortion services is impossible. It is unfortunately foreseeable that some desperate indigent women will seek abortions from people other than qualified physicians. It is also known that such "kitchen table" operations pose a grave threat to maternal health and life. Although the number of deaths as a result of illegal abortions has decline dramatically since this Court's decision in 1973, illegal abortion has not disappeared. One recent study reports:

> proportionately more nonwhite than white women continue to die following illegal abortions. This may be a consequence of their generally lower socioeconomic status. Many of these women may have been unable to afford to go outside their localities to communities where safe, legal abortions were available and obtained more dangerous self-induced or other illegal procedures at home.[37]

[36] *Id.* at 250.

[37] Cates *et al.*, "Illegal Abortions in the United States: 1972-74," 8 *Family Planning Perspectives* 86, 91 (1976). Eighty percent of the women who died from illegal abortions in 1974 were non-white. *Id.* at 87, 88. *See also* Polgar *et al.*, "The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law," 8 *Family Planning Perspectives* 125 (1976).

For all these reasons, the state policy creating a distinction between those poor pregnant women who choose delivery and those who choose abortion cannot be justified on grounds of protecting maternal health. Indeed the overwhelming evidence is that a discriminatory policy of denying services to those women who seek abortion, while providing them to those women who seek delivery, exacts an appalling price in terms of the lives and health of women.

**iv. Preservation of the Human Race Is Not a Legitimate Ground for Denying Poor Women Access to Abortions in the First Two Trimesters of Pregnancy.**

The primary justification which the City of St. Louis offers in support of its policy restricting abortions in its public hospitals is an interest in the preservation of the human race, which, according to the City, begins prior to conception and continues "throughout the gestational cycle."[38] It is no longer open to the state to invade the private lives of its citizens to enforce policies requiring that every opportunity for conception and procreation be actualized. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe* v. *Wade*, *supra*; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*.

In *Roe* v. *Wade*, this Court recognized that the state does have a legitimate interest in the protection of potential human life. 410 U.S. at 150. However, that interest becomes sufficiently compelling as to justify state interference with abortion choice only at the point of viability.

[38] *Poelker* v. *Doe*, *Brief for the Petitioners*, *supra*, n. 10 at 39-40, 49-50.



410 U.S. at 163. The state's interests in this area do not become greater simply because the women involved are poor.

**II.**

**The discriminatory policies denying public services to indigent women who choose abortion serve no secular purpose but rather only promote and establish a particular religious view in violation of the First and Fourteenth Amendments.**

The human and financial costs of the policies restricting poor women's access to abortions are plainly enormous. What purpose do these policies serve? Petitioner John H. Poelker is quite candid about the purpose of the policy he has imposed on the St. Louis public hospitals. The lower court found that "the only reason advanced by the Mayor for his policy was his own personal conviction that abortion was tantamount to murder." *Doe* v. *Poelker*, *supra* at 545, n.6. In other states, restrictions on access to abortions for poor women have been defended on frankly religious grounds.[39] These policies restricting poor women's access to abortion represent an attempt by the state to dictate, with respect to poor women, an answer to the question on when human life begins. This Court in *Roe* v. *Wade*, 410 U.S. at 159, held that since the question is, in its nature,

[39] For example, the Commonwealth of Pennsylvania, in defense of a Medicaid abortion policy similar to Connecticut's, stated the issue as follows: "Millions of Pennsylvanians, both Catholic and non-Catholic, deeply believe that abortion is the equivalent of murder. Anti-abortionists bitterly resent the expenditure of their tax dollars to pay for abortions. The Department believes that in deference to the profound belief of these citizens [it must refuse payment for 'non-therapeutic' abortions]." Defendants' Memorandum in Support of Motion for Partial Summary Judgment, *Doe* v. *Wohlgemuth*, Civ. No. 73-1564 (E.D. Pa., filed July 12, 1973).

a religious one, it must be left to individual conscience.[40] The Constitution demands that the state maintain a position of neutrality.

The Establishment Clause of the First Amendment bars the state from using its power, authority and money to further the dogma of some religions, and from forcing the religious views of some citizens upon others whose beliefs are different. The settled decisions of this Honorable Court

> dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, *e.g., Epperson* v. *Arkansas,* 393 U.S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e.g., McGowan* v. *Maryland,* 366 U.S. 420 (1961); *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963), and third, must avoid excessive government entanglement with religion, *e.g. Walz* v. *Tax Comm'n,* 397 U.S. 664 (1970). *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973).

The discriminatory policies challenged here fail to pass muster on all counts.

The sole purpose of these policies is to throw the "prestige, power and influence of a public institution," *Walz* v. *Tax Comm'n,* 397 U.S. at 696, behind one religious position on the abortion question, and to force one religious judgment upon poor women. These policies serve no other purpose. In *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), this Court held that religious motivation, in and of itself, ren-

[40] *See* Tribe, "Forward: Toward a Model of Roles in the Due Process of Life and Law," 87 *Harv. L. Rev.* 1, 21 (1973).



dered invalid a state law which was indefensible on any non-religious grounds.[41] Similarly here, the religious motivation and lack of secular purpose could in and of themselves require the invalidation of the restrictions on abortions for poor women.

The sole effect of the abortion restrictions challenged here is to provide direct state subsidy to persuade poor women, vulnerable to financial pressure because of their indigency, to follow one religious dogma on the question of abortion, whatever the women's own personal or religious convictions and judgment. The effective aid which this policy affords one religious dogma is far more central and direct than the mixed and delayed benefits to religion which this Court has invalidated in other contexts. *See Committee for Public Education* v. *Nyquist, supra; Tilton* v. *Richardson,* 403 U.S. 672 (1971).

The concept of neutrality is at the very core of the First Amendment's Establishment and Free Exercise Clauses. *See, e.g., Engel* v. *Vitale,* 370 U.S. 421 (1962); *Walz* v. *Tax Comm'n,* 397 U.S. at 694-95 (Harlan, J., concurring). This requirement of state neutrality is also at the core of the Court's decision in *Roe* v. *Wade.* "The Establishment

[41] The case for the invalidation of the policies of Connecticut and St. Louis is more compelling than that presented in *Epperson* v. *Arkansas.* Not only are the discriminatory policies based on religious motivation, but, as we have seen, their sole effect is to aid one particular religious view by penalizing women whose beliefs are different. In *Epperson* the statute was invalidated solely because of improper purpose, since presumably the Court would not have struck down a rule eliminating biology from the curriculum for secular reasons, even though that would have had as much effect in aiding Fundamentalists as the elimination of the teaching of evolution. *See* Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 *Yale L.J.* 1205, 1318 (1970); Tribe, *supra* n. 40, at 22.

Clause forbids subtle departures from neutrality, 'religious gerrymanders' as well as obvious abuses." *Gillette* v. *United States,* 401 U.S. 437, 452 (1971). If the effect of a facially neutral policy is to favor one religious view over another, the government policy can be upheld only if neutral, secular principles can be found to justify the distinction, *Gillette* v. *United States,* 401 U.S. at 449. Since the effect here is to force on the poor a single religious dogma on the abortion issue, and to penalize poor women who would choose abortion rather than childbirth, all without any secular justification, these policies restricting access to abortion raise serious questions under the Establishment Clause.

A woman's choice whether or not to have an abortion of course raises inherently religious issues.[42] The plain command of this Court's decision in *Roe* v. *Wade,* 410 U.S. at 163, is that in the first two trimesters of pregnancy these moral questions must be left to private decision-making. Despite this Court's ruling that the moral aspects of the abortion decision are beyond the Constitutional power of the states, some organized religions have continued to press states to adopt and enforce policies reflecting their particular moral dogmas.[43] To discourage this destructive religious-political strife this Court should affirm the judg-

[42] Mr. Justice Harlan, concurring in *Walz* v. *Tax Commission,* 397 U.S. at 695, observed that "Religious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws."

[43] Since this Court's 1973 abortion decisions the Family Life Division of the National Conference of Catholic Bishops and the U.S. Catholic Conference have conducted a massive nation-wide campaign promoting restrictive policies such as those held invalid by the courts below. *See Women's Lobby, Inc.* v. *McHugh,* C.A. No. 2025-73 (D.C. D.C. 1974).



ments of the courts below and reaffirm the principle that religious aspects of abortion decisions are issues upon which the law should take no stand."[44]

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.**

Respectfully submitted,

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[44] *Epperson* v. *Arkansas,* 393 U.S. 97, 103-104 (1968); *Watson* v. *Jones,* 80 U.S. 679, 728 (1871):

> Prof. Paul Freund observed in "Public Aid to Parochial Schools," 82 *Harv. L. Rev.* 1680, 1692 (1969), "as between open-ended, ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury."